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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1307

RAY A. KING,
WILLIAM B. SMITH, JR.

and

DONALD EDWARD WETTLAUFER,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WESLEY R. ASINOF
Attorney for Petitioners
Box 461
Fayetteville, Georgia 30214

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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PETITION

Now comes petitioners, and file this their petition for a writ of certiorari to review the final judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the case of United States of America versus Ray A. King, William B. Smith, Jr., and Donald

Edward Wettlaufer, Number 78-5379, and shows the following:

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORT

The official or unofficial report of the judgment and opinion has not been reported at the time of the printing of this petition, but a copy of said judgment and opinion is appended to this petition, and marked "Appendix A".

GROUNDS ON WHICH JURISDICTION IS INVOKED

1.

The date of the judgment and opinion sought to be reviewed is January 3, 1979, and the time of its entry is the same date.

2.

The Order of the Court of Appeals denying a petition for rehearing was dated and entered January 26, 1979, and is appended to this petition, and marked "Appendix B".

3.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is §28 USC 1254(1) authorizing the

review by the Supreme Court of cases in the courts of appeals by writ of certiorari granted upon the petition of any party to any criminal case, after rendition of judgment.

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the "harmless error" rule may be invoked by an appellate court in a criminal case predicated solely on the "overwhelming evidence of guilt" approach, or whether the correct standard to be applied is whether there is a reasonable possibility that the use of prejudicial inadmissible evidence or remark of counsel complained of might have contributed to the conviction.

2.

Whether a prejudicial and inflammatory remark made by a prosecuting attorney in the presence of a federal criminal jury concerning a past incident of the defendants and bearing on their character, where the defendants had not placed their characters in issue, was so prejudicial as to require the granting of a mistrial, but the trial judge instructed the jury to disregard the prejudicial remark, and the evidence was admittedly conflicting on the issue of guilt or innocence, was it proper for the trial court and the court of appeals to hold the error harmless and to refuse to grant a new trial.

3.

Where the petitioners were being tried for having conspired to violate 18 U.S.C. §241 (a felony) to interfere with a "citizen" in the free exercise or enjoyment of a federal right, and the victim alleged to have been deprived of such "right" was a convicted felon, does such conviction remove from such victim the protection of §241?

4.

Does 18 U.S.C. §241 protect a prisoner being detained in state custody from being coerced into making a confession of crime where the purpose of obtaining the confession is other than its introduction in evidence in order to convict him of a crime; that is to say, does the due process clause forbid a coerced confession where the purpose is not to convict of a crime or take away the life or liberty of the prisoner?

STATUTES WHICH THE CASE INVOLVES

Title 18 U.S.C. §241:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with

> the intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

STATEMENT OF THE CASE

Petitioners Ray King, William B. Smith, Jr. and Donald Edward Wettlaufer, hereinafter referred to as defendants, were indicted by the Grand Jury of the United States District Court for the Northern District of Georgia on a two count indictment charging them with (1) conspiring to injure, oppress, threaten and intimidate David Henry Anderson, a citizen of the United States, in the free exercise and enjoyment of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law, and (2) by striking and assaulting David Henry Anderson, an inhabitant of the State of Georgia, and depriving him of the right secured and protected by the Constitution and laws of the United States not to be deprived of liberty without due process of law, in violation of 18 U.S.C. §241 and §242, (R. 7 and 8).

A pretrial motion to dismiss count one of the indictment was filed by the defendants and overruled by the

district court. A trial was had before a jury resulting in a verdict of guilty on both counts as to all three defendants. Defendants were sentenced to three, two and one years imprisonment respectively. Motions for new trial were made by all three defendants and overruled by the trial court. Appeals were taken to the United States Court of Appeals for the Fifth Circuit, and the judgments of the District Court were affirmed. Petitions for rehearing were denied.

The events about which the conviction was obtained took place in the late evening hours of June 4, and early morning hours of June 5, 1977, at the City Hall and Police Station of the City of Mountain View, a municipality chartered under the laws of the State of Georgia in Clayton County.

Two brothers, David Henry and Josh Anderson, had visited a local bar and pool room earlier in the evening, and sometime after about 1 A.M. they were observed driving several times past the police station by an off-duty police officer, Hubert Hunnicutt, who happened to be parked in the front of the station in plain clothes. Hunnicutt observed the vehicle park several hundred yards away from the police station, and one of the brothers, David Anderson, got out and walked to a location in front of a house next door to the police station. Anderson was observed with an object in his hand. Hunnicutt then walked inside the station to call for help, when Anderson left the scene.

The Anderson brothers were apprehended by other police officers. Josh was driving the vehicle, and David was on the passenger side of the car. On the front floorboard the officers found a long iron bar honed down to a sharp point on one side, and flattened down on the other. The Andersons were taken to the police station and placed in a holding cell.

Shortly thereafter Defendant Ray King, who at that time was the mayor of Mountain View, arrived with his family. They had been to a drive-in movie. Defendant King was advised by one of the police officers that two suspects were under arrest, and he thereupon sent his family home and went in the station to investigate the situation. A rumor had circulated in the City of Mountain View that some of the political opponents of Mayor King had put out a "contract" on him to cripple or maim him, and the mayor was apprehensive that the two Anderson brothers had come to fulfill that "contract."

Defendant William Smith, who at that time was the Chief of Police, was called from his home and arrived at the police station. Defendant King confronted David Anderson in the cell block, inquiring what his business was in Mountain View at that hour of the morning. Josh Anderson shoved David Anderson back against one of the bunk beds, telling him to "keep his mouth shut." David Anderson was escorted from the cell block into the mayor's office in another part of the building. The evidence is conflicting as to what occurred in the

mayor's office. David Anderson's testimony was that he had been beaten by all three defendants. He was corroborated in this respect by officer Hunnicutt. All three defendants testified under oath that no beating took place, but that they questioned Anderson at length in order to determine if he was a "hit-man" sent by the Sosebees, a family living in Mountain View known to be opposed to defendant King. Defendant Wettlaufer was a police officer employed by the City of Mountain View.

Further testimony revealed that David Anderson was then escorted outside the building, and he was asked by defendant King to point out the spot where he was standing when he was previously spotted by Hunnicutt. A chain link fence separated the two buildings. Anderson's testimony, corroborated by Hunnicutt, was that he was thrown over the fence. Defendants King, Smith and Wettlaufer all testified that Anderson jumped over the fence. The house next to the police station where Anderson was first observed by Hunnicutt was occupied by Defendant King's mother-in-law, a widow who lived alone.

Other evidence in the case was conflicting as to the extent of Anderson's injuries, or whether he made a complaint when released from the police station the next morning. Hunnicutt's testimony was impeached by showing that he had made statements to the FBI agent shortly after the occurrence contrary to his testimony in court, stating that no mistreatment had

taken place. Anderson's testimony was also impeached by showing three prior felony convictions, and it was also shown that Anderson's arrest record showed 41 prior arrests, and that the extent of his background was being investigated by the Chief of Police during his incarceration. The number of arrests were not introduced for the purpose of impeachment, but as illustrating the basis for the intense investigation, and as also illustrating the concern of the defendants on the morning in question that David Anderson may have been a "hit-man" coming to fulfill a "contract."

The jury retired to consider their verdict at 2:30 P.M. on Thursday, April 20, 1978, (T. 479). The jury requested additional instructions, and was reinstructed at 4:28 P.M. the same day, (T. 480). At 5:33 P.M. the jury was brought back to the courtroom, and excused until the next morning, (T. 483). At 12:25 P.M. on Friday, April 21, the jury again returned to the courtroom, after the court had received two notes stating that they had not been able to reach a verdict, (T. 485). At 3:45 P.M. that same date the jury reached a verdict of guilty as to both counts on all three defendants, (T. 487).

A Motion for Judgment of Acquittal as to each defendant on Count One was made at the conclusion of the evidence for the government, and was taken under advisement by the Court. These Motions were renewed at the conclusion of all the evidence in the case, and were again made in writing after the verdicts were

returned. Motions for New Trial were also filed on behalf of all the defendants. All these Motions were finally overruled by the Court.

All three defendants took the stand and testified under oath that no such beatings took place as had been described by Anderson, and gave their version as to how the scratches on Anderson's back could have been placed there. While the Defendant King was on the witness stand, and during the cross-examination phase of his testimony, he was asked by counsel for the government whether he told two investigators for the Clayton County DA's office "in a situation similar to this" that he would lie to protect his police officers. An objection by counsel for the defendant was overruled by the court. Counsel for the government again repeated the question, stating to the defendant: "This was an investigation of two officers of yours who had allegedly beaten a prisoner in their custody in Mountain View." A motion for mistrial was then promptly made by counsel for the defendants, the jury was ordered to be retired from the courtroom, and the trial judge then rebuked government counsel, sent for the jury, instructed them to disregard the last question or remark of government counsel, and overruled the motion for a mistrial.

This conduct on the part of government counsel was made the subject matter of a motion for new trial. The court overruled the motion, based on the fact that in his opinion the "statements may have been impermissible

they were effectively rendered harmless by the overwhelming weight of the remaining evidence of the defendants' guilt". In so holding, the trial court cited *United States v. Rojas*, 537 F.2d 216.

The Court of Appeals, in affirming this ground of the appeal, held:

> "This Court need not determine whether the prosecutor's statement was error or whether any error was cured by the judge's instruction, see *United States v. Klein*, 546 F.2d 1259, for any error was harmless. The weight of the evidence was overwhelming and appellants' explanations of the marks on Anderson's back were unconvincing."

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

This Court, in a number of landmark decisions, has laid down a hard and fast rule applicable to both federal and state appellate courts that the "harmless error" rule may not be invoked by the "overwhelming evidence of guilt" approach if there can be found any

evidence in the record upon which the jury could have lawfully acquitted the defendant. The Fifth Circuit has very drastically departed from this rule.

In *Bollenbach v. United States*, 326 U.S. 607, at page 614, this Court concluded:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

In determining whether an error is "harmless" so as not to affect the substantial rights of the parties, this Court stated in *Bollenbach* that "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

Following *Bollenbach* this Court again had occasion to test the harmless error rule when it has been applied by State courts. In *Fahy v. Connecticutt*, 375 U.S. 85, (84 S.Ct. 229) a can of paint and brush were illegally admitted into evidence by a trial court in a criminal case. On appeal to the State Supreme Court it was determined that the items so introduced in evidence were illegally

seized and inadmissible as evidence. However, the State Court affirmed the conviction because it determined that there was other evidence in the record upon which the conviction could stand, holding the admission of these articles in evidence to be "harmless error." This Court, disagreeing with the State Court, reversed and held as follows:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. *The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.*" (emphasis added.)

Later, in *Chapman v. California*, 386 U.S. 18 (87 S.Ct. 824) the same rule was applied by this Court to prejudicial arguments of a prosecuting attorney. The Supreme Court of California admitted the petitioner had been denied a fair trial as guaranteed by the Constitution because of the prejudicial argument, but refused to reverse the conviction because it found from "other substantial evidence, (that) the proof of his guilt must be deemed overwhelming." (63 Cal. 2d, at 197, 45 Cal. Rep. at 740, 404 P.2d, at 220). This Court reversed, holding:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. State of Connecticutt*, 375 U.S. 85, 84 S.Ct. 229."

The Court further held that error in admitting prejudicial comments "casts on someone other than the person prejudiced by it a burden to show that it was harmless. * * * * We therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Court of Appeals was very reluctant to, and therefore did not, hold that the prosecutor's remark was improper, or that the trial judge's failure to grant a mistrial was error. This was perhaps due, in some measure, to the fact that the trial judge at the time of sentencing the defendants stated that "this case was tried to a jury, and there was obviously a sharp issue of fact that the jury had to determine." (T. 498) It was also stated by the trial judge at the same time that "there was a great variation in facts."

Not only is the decision of the Fifth Circuit in this case in conflict with the applicable rulings of this Court as has been cited, but other holdings by the same Court show there is no consistency in its decisions. The holding by the Fifth Circuit in *United States v. Klein*, 546 F.2d 1259, upon which the opinion in the case at bar is predicated, and *United States v. Rojas*, 537 F.2d 216, both

seem to find their genesis in opposition to the settled rule of this Court, while in *Vaccaro v. United States*, 461 F.2d 626, and *DeLuna v. United States*, 308 F.2d 140, the Fifth Circuit has refused to apply the "harmless error" rule based on overwhelming evidence of guilt.

In *Vaccaro* Chief Judge Brown, speaking for the Court, held:

> "Indeed, the recent Supreme Court decisions regarding 'harmless constitutional error' specifically reject the 'overwhelming evidence of guilt' approach and stress instead that the relevant inquiry is 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' "

In *De Luna*, the Fifth Circuit held:

> "The government's final argument is that the impropriety of the comments on De Luna's failure to testify was in any event harmless error. The Government maintains that the record in the instant case 'shrieks of the guilt' of the appellant. The harmless error rule has restricted applicability in criminal cases. Since the defendant holds a carefully guarded right to have his guilt adjudged by a jury, an appellate court should be slow to assume that an error in the trial was inconsequential."

The rationale of *Bollenbach, Fahy* and *Chapman* is that appellate courts may not substitute their judgment of the facts for that of the fact-finding body; that the harmless error doctrine may not be reached via the overwhelming evidence of guilt approach so long as there is any evidence from which the fact-finder, under proper guidance of the judiciary, may base a legitimate verdict of not guilty.

Bollenbach was a federal case in which the supervisory power of the Supreme Court over the federal judiciary was activated. *Fahy* was a state case in which unconstitutionally seized evidence was used to aid in a state conviction. *Chapman* was a state case in which an improper remark or argument of a prosecuting officer, rising to the level of a deprivation of a constitutional right to remain silent, was permitted to prejudice a jury charged with the responsibility of determining the truth of the issues. Nowhere in the opinion of the Court of Appeals in the case at bar did the Court find either (1) that the improper remark of the prosecutor did not contribute to the verdict of guilt, (2) that the remark was harmless beyond a reasonable doubt, or (3) that there was no reasonable possibility that the prejudicial remark might have contributed to the conviction.

Certiorari should be granted in this case in order to stabilize the decisions of the Fifth Circuit as to this important and recurring question.

2.

The inflammatory remark made by the prosecutor was so prejudicial as to demand a mistrial where the evidence was conflicting on issue of guilt or innocence.

In a footnote to the opinion of the Court of Appeals in this case, (Appendix A) the cross-examination of defendant King is set forth verbatim. The incident to which the prosecutor was referring was alleged to have occurred in 1974. Defendant King was the mayor, and the other two co-defendants were Smith and Wettlaufer, two police officers of the City of Mountain View. The question concerning an incident in 1974 was not relevant to any issue on this trial. The two police officers referred to by the prosecutor, for all the jury knew, may have been the other two defendants on trial. None of the defendants had placed their characters in issue. The remark made by the prosecutor referred to "an investigation of two officers *of yours* who had allegedly beaten a prisoner in their custody in Mountain View." This remark referred to the commission of another independent crime which was in no way related to the crime charged. There can be no doubt that the prosecutor had seriously damaged whatever defense the defendants had. In *Boyd v. United States,* 142 U.S. 450, 12 S.Ct. 292, this Court held:

> "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried

upon competent evidence, and only for the offense charged."

The role of the United States Attorney is more than only being the prosecuting officer. His position commands respect, and his actions should not indicate to the jury his personal belief in the guilt of a defendant. In *Berger v. United States*, 295 U.S. 78, (55 S.Ct. 629) this Court held:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

In *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, this Court had occasion to examine whether a prejudicial error can be allowed to stand because of other evidence in the record showing guilt. This Court held:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The damage done to the defense in this case by the prosecutor's remark involving an investigation of a similar nature in 1974 was compounded by the fact that the defense was without an opportunity to disprove the remark, because to have done so would have opened up the field and waived the objection. The admonition by the trial judge to the jury to disregard the remark left the jury with the definite impression that the defendant's were trying to conceal some prior wrongdoing. Furthermore, after the trial judge instructed the jury to disregard "the last question asked by counsel for the government", he then instructed counsel to proceed with her cross-examination, at which point she stated in the presence of the jury: "Your Honor, since the Court has excluded *that evidence*, the Government has no other questions of this witness." (Tr. Vol. II, p. 435.) This left the jury with the impression that she had evidence of prior misconduct by the defendants but that the court would not allow it to be used.

This Court should grant certiorari on this very important question so as to settle and define what type of inadmissible evidence may be excluded by an admonition to a jury, and what type of prejudicial and inadmissible statements require and demand mistrials.

3.

The protection of Title 18, U.S.C. §241 does not extend to convicted felons but protects only those rights of citizenship which belong to citizens of this country.

The alleged victim in this case, David Anderson, is not a "citizen" of the United States by virtue of his several felony convictions, and thus does not come within the protection of Title 18 USC §241. This question is apparently one of first impression. Neither the defendants nor the government was able to find a clear-cut definition for the trial court or the Court of Appeals.

The history of a §241 violation, as distinguished from §242, indicates that congress must undoubtedly have intended to make a distinction between the two sections. §241 protects the "citizen" from conspiracies to deprive him of a federally protected right, whereas §242 protects an "inhabitant" of a State from an assault made under color of State law. If this were not so, then those protected under §242 would automatically be protected under §241, except for the requirement of a conspiracy. Furthermore §242 is a misdemeanor, and the general penalty for conspiring to commit a misdemeanor is itself a misdemeanor. Why then did congress make §241 a felony punishable up to five (5) years? The answer to this question suggests only one logical conclusion, and that is that §241 is designed to protect *citizens* in those rights set apart to them alone.

(1) The right to vote; (2) the right to hold public office; (3) the right to serve on a jury; (4) the right not to be imprisoned in a penitentiary.

The right to vote is a federally protected right, but if a person born in the United States has been convicted of a felony, he would be without a federally protected right to vote because of his loss of citizenship. A citizen has the federally protected right to hold public office, and a conspiracy to deprive such citizen of this right may constitute a violation of §241, except if such citizen has been convicted of a felony this fact alone would require a judgment of acquittal because this right to hold public office has been lost because of the conviction. The same would hold true with respect to the right to serve on a jury.

The trial court, in denying the motion for judgment of acquittal on this ground, reasoned that "Such a conclusion would substantially immunize public officials from criminal liability for violating the constitutional rights of others," (T. 115). Defendants take issue with this ruling, however, and insist that there can be no criminal liability for violating constitutional rights of non-citizens unless congress so provides. Congress has made no provision under §241 for conspiring to violate the federally protected rights of non-citizens, except that of conspiring to violate §242. Congress has the right to distinguish between "citizens" and "inhabitants", and that is exactly what they have done.

4.

Due Process is not denied in the obtaining of a coerced confession unless it is intended to be used as evidence.

Count 1 of the indictment charged that the defendants, while acting under color of the laws of the State of Georgia, did conspire to injure, oppress, threaten and intimidate a citizen of the United States in the free exercise and enjoyment of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law. It was further charged that the purpose of the conspiracy was to attempt to induce David Henry Anderson *to confess to a crime.*

There was no allegation of an intent to use such confession, once obtained, in a court of law. The government did not choose to charge the defendants with depriving Anderson of any other federally protected right, either constitutional or statutory. Thus the inquiry is limited to the question of whether the mere act of obtaining a coerced confession, for any purpose other than the deprivation of life or liberty, constitutes a violation of due process.

The Court of Appeals recognized "that the right not to be assaulted by a police officer while lawfully in custody is protected under §242." The Court of Appeals then held that "(a)ny right protected under §242 must be included in those protected under §241".

In this the Court of Appeals erred. Congress made a violation of §242 a misdemeanor. Thus, an assault of one lawfully in custody by a police officer is a misdemeanor under §242, and a conspiracy between police officers to assault one lawfully in custody is a violation of Title 18, §371, punishable as a misdemeanor. The right not to be assaulted is not a federally protected right under §241, but is a protected right under §242, and §371. The right not to be deprived of due process is a federally protected constitutional right only when life or liberty is also deprived. The mere act of obtaining a confession, either by coercion or force, without intending to deprive the confessor of his life or his liberty, does not amount to the deprivation of a constitutional right.

Where a police officer obtains a confession by coercion or force, but does not use such confession in court, there has been no deprivation of life or liberty. The Court of Appeals cited *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, in support of its holding that §242 included as broad a range as §241. However, *Price* is misplaced. *Price* involved the murder of three persons. Thus, the acts there committed by the officers of the State of Mississippi deprived their victims of their lives. The act of securing a confession, or attempting to do so, without more, does not involve the taking of life or liberty.

It must be noted at this point in time that the defendants made no motion with respect to count two charg-

ing that the defendants, while acting under color of the laws of Georgia, did willfully strike and assault David Henry Anderson, an inhabitant of the State of Georgia.

The difference between Count One and Count Two is that the obtaining of a confession, or an attempt to obtain one, is not made an element of Count Two. Originally it was the principal purpose of a 241 violation "to reach private action rather than officers of a State acting under its authority." *United States v. Williams*, 341 U.S. 70 (71 S.Ct. 581). This case involved a police officer and a private detective using force in obtaining confessions. The conviction was reversed by a 5 to 4 judgment of the Supreme Court. In *United States v. Price*, 383 U.S. 787 (86 S.Ct. 1152) it was held for the first time that a violation of "due process" was a federally protected right which was "granted or secured" to a citizen. However, in *Price* three citizens were murdered by State officers in order to deprive them of their "life" without a trial. *Williams* was never overruled by *Price*.

The obtaining of a confession by whatever means, either by private individuals or by action of State officers, without more does not deprive an individual of due process of law. It is not until that confession is used in a court of law to convict an individual that due process comes into play. For example, if a confession is obtained from an individual by the use of coercion by state officers acting under color of state law, and the individual is brought to trial, but the confession is never used or offered into evidence, it should not be held that

the conviction was obtained in violation of the due process clause, or if a confession is obtained under threat of prosecution for another crime, and if that confession is used by having the confessor testify against another person, due process has not been denied the confessor. In *United States v. O'Dell*, 462 F.2d 224 (1972) it was held that the act of forcing a confession is a violation only "if undertaken as part of an intentional and effective effort to deprive an individual of his right to trial or other federal right." In *Chambers v. State of Florida*, 309 U.S. 227 (60 S.Ct. 472) it was held that "*use* by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment." In *Brown v. Mississippi*, 297 U.S. 278 (56 S.Ct. 461) it was recognized that the "*use*" of a forced confession denied due process.

There is nothing in the due process clause to prohibit state action in obtaining a confession by the use of coercion; it is only when that coerced confession is offered into evidence as a means to deprive an individual of his liberty that due process is denied. In *Screws v. United States*, 325 U.S. 91 (65 S.Ct. 1031) a sheriff, policeman and special deputy arrested a citizen and beat him to death. In reversing the conviction for a §241 violation, the Supreme Court held:

> "To convict it was necessary for them (the jury) to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal. * * * *

> "The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. * * * * Thus Congress in §20 (now 18-241) of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within §20 only specified acts done 'under color' of law and then only *those acts* which deprived a person of some right secured by the Constitution or laws of the United States." (emphasis added.)

Just what are "those acts" which deprive a person of some right secured by the Constitution? The use of force to obtain a confession of crime is not a deprivation of a right secured by the Constitution. On the other hand, it is not until that confession has been received in evidence that due process has been denied.

No contention has been made in this case by the government, or found by the Court of Appeals, that Anderson was under an illegal arrest at the time the acts complained of were committed. That there was evidence of an assault by one or more of the defendants, constituting a violation of §242, has not been denied. That the defendants could have been charged with or convicted of, a violation of §371 (misdemeanor conspiracy) is not disputed. But to charge the defendants with violating §241 in order to increase the assault, a misdemeanor, to a deprivation of a constitutional right, a felony, when the only purpose alleged is the coercion of a confession, distorts and thwarts the intention of congress in the protection of constitutional rights.

CONCLUSION

For all of the foregoing reasons the certiorari should be granted, and the judgment of affirmance by the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

Wesley R. Asinof
Attorney for Petitioners
P.O. Box 461
Fayetteville, Georgia 30214

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals on Hon. Wade McCree, The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and one copy on Hon. C. Michael Abbott, Assistant United States Attorney, United States Courthouse, Atlanta, Georgia 30303, by depositing same in the United States Mail, postage prepaid, this the ____ day of February, 1979.

Wesley R. Asinof

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

Ray A. KING, William B. Smith, Jr., and Donald Edward Wettlaufer,
Defendants-Appellants.

No. 78-5379
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 3, 1979.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellants are former Mayor King, Police Chief Smith, and Police Officer Wettlaufer of Mountain

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

View, Georgia. They were jointly indicted for violation of 18 U.S.C. §§ 241 and 242. The former makes it a felony to conspire to interfere with a citizen in the free exercise or enjoyment of any constitutional or federal right. Section 242 makes it a misdemeanor willfully under color of law to subject an inhabitant of any state, district, or territory to deprivation of any constitutional or federal right, privilege, or immunity. The indictment stemmed from an alleged beating of David Anderson, while he was in appellants' custody, in an attempt to force a confession that Anderson and his brother were in town to execute a "contract" on the mayor or police chief. Appellants were convicted on both counts.

Anderson and his brother were arrested late one night after Officer Hunnicutt observed Anderson behaving in a suspicious manner near City Hall. Anderson testified that he was taken into the mayor's office, where appellants questioned him about the contract, attempted to get Anderson to hit one of them, and then hit him repeatedly when he would not do so. Appellants then took him outside to the area where Hunnicutt had first observed him. They urged him to jump a chain link fence and run away, which he refused to do; they then planted a knife in his pocket, tossed him over the fence, and again tried to make him run.

Officer Hunnicutt was present during some of the beating in the mayor's office, and his testimony corroborated that of Anderson. Hunnicutt also testified

that appellant Smith told him to find a "drop gun"[1] to plant on Anderson, but that he could find only a pocket knife, which appellants placed in Anderson's pocket. Hunnicutt did not see appellants throw Anderson over the fence, for he was walking toward the tree where he initially had observed Anderson. He did hear Anderson refusing to jump just prior to his landing on the far side of the fence. At that point Hunnicutt realized that Anderson's life was in danger, and he moved to his side and advised Anderson to stay close beside him. Both Anderson and Hunnicutt testified that appellant King was brandishing a pistol during the incident outside City Hall.

There was additional corroborative testimony. A police officer testified that on the following morning Anderson complained of pain from a beating and requested to be taken to a hospital. The officer observed cuts, scratches, and "little whelps" on Anderson's back. On advice from appellant Smith, the officer released Anderson, who went to a hospital. The admitting physician testified to recently-formed raised and reddened areas on Anderson's back and bruises on his legs. Anderson's brother and girl friend testified to his injuries. There was also testimony of banging or thumping noises in the mayor's office at the time of the beating.

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1 A drop gun is a weapon dropped at the scene when a police officer has killed someone in the line of duty. The presence of a weapon protects the officer against accusations of killing an unarmed person.

Appellants testified in their own behalf. They denied any assault, but stated that their questioning followed a "good guy-bad guy" pattern and that they shouted threats and pounded on desks and file cabinets. They admitted threatening to throw Anderson over the fence, but said that he had jumped and was not thrown. They denied all knowledge of a drop gun or knife. King and Wettlaufer testified that Anderson's brother had shoved him against a metal bunk in the jail cell, thereby causing any marks on his back. Smith testified that Anderson's back had hit the chain link fence when he jumped over it.

Appellants raise two issues of statutory construction of § 241. First, they argue that Anderson is not a citizen within the meaning of the statute because he is a convicted felon. Section 241 protects citizens, whereas § 242 protects inhabitants from similar intrusions. Appellants interpret this distinction as limiting § 241 to a small number of rights, such as the right to vote, hold public office, serve on a jury, and not be imprisoned.

The argument is untenable. The U.S. Supreme Court has held in no uncertain terms that § 241 encompasses *"all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." *United States v. Price*, 383 U.S. 787, 800, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1965). This includes rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments. 383 U.S. at 805, 86

S.Ct. 1152. Section 241 has been utilized to protect the right to be a witness in a federal trial, *United States v. Guillette*, 547 F.2d 743, 748 (2d Cir. 1976), and the right to be free from unreasonable search. *United States v. Liddy*, 177 U.S. App.D.C. 1, 6-7, 542 F.2d 76, 81-82 (1976). In *Price* the Supreme Court outlined the legislative history of the two statutes and rejected arguments that they must be interpreted to preclude duplication of rights protected. 383 U.S. at 802 n. 11, 86 S.Ct. 1152.

This Court has held that convicted felons in prisons do not forfeit all of their constitutional rights.[2] *E. g., Newman v. Alabama*, 503 F.2d 1320, 1329 n. 13 (5th Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102. *See Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

Appellants also argue that there is no protected right to be free from assault for the purpose of obtaining a confession when that confession is not sought to be introduced as evidence at trial. This right, however, has been enunciated clearly in several decisions construing § 242. *E. g., Williams v. United States*, 341 U.S. 97, 101-02, 71 S.Ct. 576, 95 L.Ed. 774 (1951); *Pool v. United States*, 260 F.2d 57, 65-66 (9th Cir. 1958); *Apodaca v. United States*, 188 F.2d 932, 936 (10th Cir. 1951). Appellants concede, as they must, that the right not to be assaulted by a police officer while lawfully in custody is

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2 In a recent opinion with a different factual setting than the one before us today, we indicated that § 241 applies to convicted felons. *See United States v. Purvis*, 580 F.2d 853, at 857 (5th Cir. 1978).

protected under § 242. *United States v. Stokes*, 506 F.2d 771, 774-75 (5th Cir. 1975). Appellants contend in effect that these rights are not protected under § 241.

The argument is frivolous. Any right protected under § 242 must be included in those protected under § 241. Initially § 242 was limited to a few specified rights, while § 241 was not so restricted. Section 242 was later amended to include as broad a range of rights as those protected by § 241. *See United States v. Price*, 383 U.S. 787, 802-03, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). Thus the legislative history undermines appellants' argument. Additionally the *Price* Court emphasized that § 241 was to be interpreted as broadly as its language permitted. 383 U.S. at 801, 86 S.Ct. 1152. Both the right not to be assaulted by a police officer while lawfully in custody and the right not to be assaulted for the purpose of obtaining a confession are rights made specific by court decisions and therefore are protected under § 241. *See Screws v. United States*, 325 U.S. 91, 104, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

Appellants also argue that a statement by the prosecutor during cross examination of King was so prejudicial and inflammatory that it requires reversal of their convictions. The prosecutor asked King whether he had stated to investigators in a similar situation that he would lie to protect his police officers. The trial judge overruled defense counsel's objection, and King twice asked for further details about the alleged statement. The prosecutor replied that she was referring to a 1974 investigation of allegations that

police officers had beaten a prisoner.[3] The judge denied a defense motion for a mistrial, but ruled that the evidence was inadmissible and instructed the jury to disregard the question. As the jury deliberated for a number of hours and twice indicated an inability to reach a verdict, appellants contend that impermissible reference to another incident of police brutality may have swayed their decision.

This Court need not determine whether the prosecutor's statement was error or whether any error was cured by the judge's instruction, *see United States v.*

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3 "BY MS. MOORE:
Q. Mr. King, isn't it a fact that in 1974 you told two investigators for the Clayton County DA's office in a situation similar to this that you would like (sic) to protect your police officers?
MR. ASINOF: May it please Your Honor, we object to that as being —
THE COURT: I didn't hear the full question on that.
MS. MOORE: Your Honor, I have asked him —
THE COURT: What was the question again?
MS. MOORE: I asked Mr. King whether or not he told two investigators for the Clayton County District Attorney's Office in a situation similar to this that he would lie to protect his police officers.
THE COURT: I overrule the objection.
MS. MOORE: Thank you, Your Honor.
BY MS. MOORE:
Q. What was the answer, sir?
A. I don't remember talking to—are you talking about the police department or what, ma'am?
Q. Sir, I'm talking about an interview in February, 1974.
A. With what type investigator?
Q. This was an investigation of two officers of yours who had allegedly beaten a prisoner in their custody in Mountain View."

Klein, 546 F.2d 1259, 1263 (5th Cir. 1977), for any error was harmless. The weight of the evidence was overwhelming and appellants' explanations of the marks on Anderson's back were unconvincing. *See Klein, supra* at 1263.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

January 26, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5379 — UNITED STATES OF AMERICA v. RAY A. KING, WILLIAM B. SMITH, JR., and DONALD EDWARD WETTLAUFER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of

the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk